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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-274

MILTON PARNESS AND BARBARA PARNESS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–21a) is reported at 503 F. 2d 430. The opinion of the district court (Pet. App. 24a–30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1974. A petition for rehearing with a suggestion for rehearing *en banc* was denied on August 15, 1974 (Pet. App. 23a–24a). The petition for a writ of certiorari was filed on September 13, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1962(b) applies to investments in foreign enterprises.

2. Whether 18 U.S.C. 1962(b), as interpreted and applied here, is void for vagueness.

3. Whether the evidence against petitioners was sufficient to support their convictions.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, both petitioners were convicted on two counts of causing interstate transportation of converted property and one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud, in violation of 18 U.S.C. 2314. Petitioner Milton Parness was also convicted on one count of acquiring control of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(b). Milton Parness was sentenced to a ten-year term of imprisonment on each count, the sentences to run concurrently, and was fined a total of $55,000. Petitioner Barbara Parness [1] was sentenced to concurrent two-year terms of imprisonment and was fined a total of $6,000, but the execution of her sentence was suspended and she was placed on probation for three years. The court of appeals affirmed the convictions (Pet. App. 1a–21a).

[1] Petitioner Barbara Parness was Barbara Landew at the time of the commission of the acts charged in the indictment; she married Milton Parness thereafter. Accordingly, petitioner Barbara Parness will be referred to as Barbara Landew throughout this brief, and petitioner Milton Parness will be referred to as Milton Parness or Parness.

1. The proof at trial established a complex scheme through which petitioners defrauded Allan Goberman of his 90.5 percent stock holdings in a multi-million dollar gambling casino-hotel corporation, the St. Maarten Isle Hotel Corporation (Hotel Corp.) in the Netherlands Antilles. Petitioners accomplished the scheme by illegally diverting to their own use a large portion of receipts collected by them for and belonging to Hotel Corp. These funds converted by petitioners were then used to lend Goberman $160,000, with Goberman pledging his entire stock interest in Hotel Corp. to secure this loan. By continuing to divert or withhold part of Hotel Corp.'s outstanding receipts, thus effectively preventing Goberman from obtaining the necessary funds, petitioners made it impossible for Goberman to repay the loan. Thereupon Milton Parness foreclosed on the loan and took control of Hotel Corp. To cover up the scheme by which he had obtained the controlling interest in Hotel Corp., Parness then acquired another company and had documents prepared falsely stating that this newly acquired company had provided the funds for the loan to Goberman.

More specifically, the evidence, which is comprehensively set forth in the opinion of the court of appeals (Pet. App. 3a–13a), disclosed that in 1970 Goberman, a Pennsylvania businessman, owned 90.5 percent of the stock of Hotel Corp., a newly opened hotel-casino complex on St. Maarten Island in the Netherlands Antilles. Goberman also held a $3.5 million demand note from Hotel Corp. representing money advanced for completion of construction of the hotel,

including some two million dollars borrowed from Pennsylvania banks and other American sources (Tr. 30, 35). By agreement with Goberman in 1970, Milton Parness, through his New Jersey company, Olympic Sports Club, Inc. (Olympic), became the exclusive organizer of gambling junkets from the United States to the St. Maarten casino and assumed sole responsibility for collecting "front money" from junket participants as well as IOUs or markers after their return to the United States (Tr. 24, 25, 69).[2]

In October 1970, Hotel Corp. encountered serious financial problems, and Goberman was forced to borrow $150,000 from one Leonard Holzer on a short term basis, giving a promissory note secured by his stock in Hotel Corp. in return. Parness was aware of the loan and of Hotel Corp.'s financial difficulties (Tr. 71–74). When Holzer threatened to call the note, Goberman repeatedly asked Parness for approximately $400,000 in marker collections that Parness claimed he had not yet been able to collect (Tr. 70, 74–75, 80–81). Ultimately, Holzer foreclosed. Goberman's stock was about to be sold when Parness told Goberman that, while the outstanding markers were still uncollectible, he had arranged to borrow $150,000 for re-

[2] Each gambler was required to post a certain amount of money before leaving the United States, in exchange for which he was given chips at the hotel's casino; after exhausting this amount of cash, he could continue to gamble on credit evidenced by IOUs or markers. If a player failed to win and redeem his marker, he returned to the United States with the marker outstanding. The junketeer who organized the junket (in this case, petitioner Milton Parness acting through Olympic) was then responsible for collecting on the marker in the United States and remitting the cash, less commission, to Hotel Corp.

payment of the Holzer loan (Tr. 81, 85–86). Parness said, however, that as a part of the loan arrangement, the lenders demanded a pledge of Goberman's stock in Hotel Corp. A loan agreement for $160,000 [3] was then executed between Goberman, as borrower, and two nominees of Parness—Barbara Landew and Stanley Amsterdam—as lenders. Neither in fact supplied any of the funds for the loan, Amsterdam signing the agreement at Milton Parness's request (Tr. 796).

On February 4, 1971, Barbara Landew went to a New Jersey bank and, with $99,000 in cash and a $56,000 check drawn on Olympic's account, purchased two cashier's checks in the amounts of $150,000 and $5,000 to pay principal and accrued interest on the Holzer loan (Tr. 701–705, Gov. Exh. 41). The same day, pursuant to Milton Parness's instructions (Tr. 92–94, 720), Goberman and Holzer's attorney drove from New York to New Jersey, where they picked up the cashier's checks and returned to New York. On February 9, 1971, with a $5,000 check drawn on Olympic's account, Barbara Landew bought another $5,000 cashier's check at the same bank and forwarded it to Holzer's counsel in New York as legal fees (Tr. 706–707, Gov. Exhs. 45, 46).[4] At Milton Parness's di-

[3] The loan for $160,000 represented the principal of the Holzer loan ($150,000), plus $5,000 in accrued interest and $5,000 in legal fees for Holzer's attorney.

[4] The interstate transportation of the two cashier's checks on February 4, Goberman's interstate travel on the same day, and the February 9 interstate transportation of the additional $5,000 cashier's check constituted the separate violations of 18 U.S.C. 2314, as well as the "pattern of racketeering activity" necessary for Parness's conviction under 18 U.S.C. 1962(b). See *infra*, pp. 12–17.

rection, the two Olympic checks were recorded on the company's books as fictitious payments for air travel (Tr. 811, 851). Later, Parness described them to his accountant as a "redeposit" of funds and not air fare (Tr. 833), but only when the government's investigation of the case had begun did he advise his accountant that the money was a loan to Goberman (Tr. 830–832). Contrary to Parness's representations to Goberman, Olympic's books showed that during the first three months of 1971 there were substantial marker collections (Tr. 749–756, 779–780, 781–789, 813). In fact, shortly before the loan to Goberman, Internal Revenue Service agents seized $60,000 in cash marker collections being delivered to Parness (Tr. 530–533).

2. During February and March of 1971, Goberman was unsuccessful in his efforts to obtain funds from Parness in unremitted markers with which to repay the purported lenders, Landew and Amsterdam. On April 3, 1971, documents were executed that effectively foreclosed on the Goberman loan and divested Goberman of his stock in Hotel Corp. Shortly thereafter, Parness acquired Aliter Holdings, a shell Antillean corporation, and appointed his cousin, Edward Levrey, nominal managing director (Tr. 1411). Barbara Landew and Amsterdam transferred "their" interest in Hotel Corp. to Aliter. A letter of June 19, 1971, purportedly written by Levrey, falsely stated that Aliter had provided the funds for the Goberman loan and that Landew and Amsterdam had acted as its agents throughout (Tr. 1416–1418). The various documents divesting Goberman of his stock had made similar false claims (Gov. Exhs. 77–83). In the summer of

1971, Parness, again through Levrey, acquired Terrasol Holdings which exchanged its common stock for Aliter's holdings in Hotel Corp. (Tr. 1421, Gov. Exhs. 100–101). A prospectus prepared at Parness's direction for the sale of Terrasol stock in Canada falsely represented that the shares of Hotel Corp. stock had been purchased by Levrey from Goberman for $160,000 (Gov. Exh. 150). Finally, petitioner Barbara Landew testified before the grand jury that the money for the Goberman loan had come from Levrey in cash (Tr. 870), knowing that in fact Olympic checks were used and that Levrey had not supplied the funds.

ARGUMENT

1. Petitioners claim that the court of appeals erred by giving extra-territorial effect to Section 1962(b) of the Organized Crime Control Act of 1970, 18 U.S.C. 1961 *et seq.*, and that that section of the Act, as interpreted and applied in this case, is unconstitutionally vague and is therefore void. While these issues are raised in a joint petition, we must assume that the arguments are made only on behalf of petitioner Milton Parness, since he alone was convicted of violating 18 U.S.C. 1962(b).[5] Moreover, since, as petitioners point out (Pet. 20), the constitutional and statutory issues in this case appear to be ones of first impression and there is no judicial authority supporting petitioners' contentions, it would be appropriate to allow other district courts and courts of appeals to consider

[5] Barbara Landew was convicted on three counts of violating 18 U.S.C. 2314.

the issues before this Court decides whether it should undertake to resolve them.[6]

We turn now to the merits of petitioners' arguments.

a. Petitioners contend (Pet. 21–25) that, in enacting Title IX of the Organized Crime Control Act of 1970, of which Section 1962(b) is a part, Congress did not intend to proscribe the acquisition of foreign businesses by means of criminal conduct committed in the United States, despite the impact of such activities on interstate and foreign commerce.[7] The court of appeals rejected this argument in language upon which we rely (Pet. App. 15a–16a):

> Section 1962(b) proscribes the acquisition of "any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." [Footnote omitted]. "Enterprise" is defined in

[6] We note further that petitioner Milton Parness received concurrent prison terms on the Section 1962 conviction and the three violations of Section 2314. While he was separately fined on the Section 1962 count, so that the court of appeals had no discretion to decline to consider his challenge to the application of the anti-racketeering provisions of Section 1962 under the concurrent sentence doctrine, we think it is relevant in determining whether to grant plenary review in this Court that all that is at stake for petitioner on this issue is the fine of $25,000.

[7] 18 U.S.C. 1962(b) provides: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

§ 1961(4) to include "any * * * corporation". On its face the proscription is all inclusive. It permits no inference that the Act was intended to have parochial application. The legislative history, moreover, strongly indicates the intent of Congress that this provision be broadly construed. For example, the House Report on § 1962 states that:

> "*any acquisition* meeting the test of subsection (b) is prohibited *without exception.*" (emphasis added)[12]

We find Parness' claim unpersuasive for yet another reason. It presupposes that in enacting § 1962(b) Congress intended to focus exclusively upon the enterprise acquired and sought to protect only American institutions. There is no indication that the statute was meant to have such a limited remedial scope. On the contrary, its legislative history leaves no room for doubt that Congress intended to deal generally with the influences of organized crime on the American economy and not merely with its infiltration into domestic enterprises.

In its Statement of Findings and Purpose, by way of preface to Title IX, Congress made clear its concern for American investors and businessmen, as well as American institutions:

> "(1) organized crime in the United States * * * annually drains billions of dollars from America's economy by unlawful conduct * * *; (4) organized crime activities * * * weaken the stability of the Nation's economic system, harm innocent investors * * * and undermine the general

> welfare of the National and [American] citizen; * * *" [Footnote omitted]
>
> Moreover, the provisions of §§ 1963 and 1964 for broad civil remedies to victims of such infiltration further indicate the intent of Congress to protect the individual, as well as the "enterprise".
>
> In short, we find no indication that Congress intended to limit Title IX to infiltration of domestic enterprises. On the contrary, the salutary purposes of the Act would be frustrated by such construction. It would permit those whose actions ravage the American economy to escape prosecution simply by investing the proceeds of their ill-gotten gains in a foreign enterprise. We reject any such construction.

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[12] H.R. No. 1549, 91 Cong. 1st Sess. (1970), quoted in 2 U.S. Code Cong. & Admin. News 4033 (1970).

Indeed, Congress clearly intended that the Act as a whole "be liberally construed to effectuate its remedial purposes." Pub. L. No. 91–452, § 904 (1970).

Petitioners rely (Pet. 22) upon cases arising under the Labor-Management Relations Act, 1947, 29 U.S.C. 141 *et seq.*, in support of the principle that, absent a clear and affirmative expression of congressional intent to extend the reach of a statute extraterritorially, legislation is *prima facie* territorial. See *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138; *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10; *Windward Shipping* v. *American Radio Association,* 415 U.S. 104. The court of appeals noted, however, that these cases, besides supporting the "rather obvious proposition ~~for which these cases stand is simply~~ that a court should consider the legislative history of a statute to deter-

mine its applicability to a given factual situation," involved the exercise of American sovereignty in a regulatory area (maritime law) in which international comity was traditional and the potential for international discord was great (Pet. App. 17a). It continued (Pet. App. 18a):

> Title IX, by way of contrast, in no way involves regulation of the internal affairs of enterprises subject to the sovereign power of foreign states. The application of § 1962(b) here cannot conceivably endanger American foreign relations. The statute simply provides federal law enforcement agencies with the tools with which to combat organized crime in the United States.

Petitioners' reply (Pet. 24)—that there is indeed "a potential degree of international discord arising from this American effort to prohibit a particular kind of stock investment in a foreign enterprise that is subject to the laws of Netherlands Antilles * * *"—is particularly hollow on the facts presented here. Hotel Corp. was a "foreign enterprise" in only the most superficial sense. It was an enterprise almost wholly owned by an American citizen, primarily serving American tourists spending American money, to which American financial sources had loaned some two million dollars, and whose accounts were payable in United States dollars to a New Jersey corporation (Olympic Sports Club, Inc.). While, as petitioners point out, the court in *McCulloch* rejected any "balancing of contacts" in determining whether the National Labor Relations Act applied to the crews of foreign-flag ships (372 U.S. at 19), that was said in a

context where "the [National Labor Relations] Board's assertion of power * * * has aroused vigorous protests from foreign governments and created international problems for our Government" (*id.* at 16–17); hence "a purely *ad hoc* weighing of contacts" could portend "considerable disturbance not only in the field of maritime law but in our international relations as well." *Id.* at 19. No such probability exists in the present case.

b. Petitioners next claim (Pet. 26–31) that 18 U.S.C. 1962(b), as interpreted and applied in this case, is unconstitutionally vague and is therefore void. We submit, however, that the language of the statute clearly and unambiguously applies to petitioner Parness's activities and that the court of appeals therefore correctly rejected this contention.

Section 1962(b) proscribes the acquisition of control, "through a pattern of racketeering activity," of any enterprise affecting interstate or foreign commerce. Section 1961(1) clearly defines "racketeering activity," *inter alia,* as any act indictable under any of nineteen or more specified provisions of Title 18 of the United States Code, including section 2314. Section 1961(5), in turn, defines a "pattern of racketeering activity" as requiring at least two acts of racketeering activity. Accordingly, it is clear that, "as applied here, § 1962(b) proscribes the acquisition of any interest in any enterprise affecting interstate or foreign commerce resulting from at least two acts which are indictable under § 2314" (Pet. App. 19a).

Petitioners were in fact charged with three separate violations of Section 2314. Specifically, they were

charged in counts 4 and 6 with causing the proceeds of converted marker collections to be transported in interstate commerce and in count 5 with causing Goberman to travel in interstate commerce "in execution of a scheme to defraud" him. In addition, Milton Parness was charged in count 1 with a violation of 18 U.S.C. 1962(b), the statute challenged here. It was alleged in that count that he "devised and executed a scheme to defraud" Goberman by a pattern of racketeering activity (alleging three separate violations of Section 2314) leading to acquisition of control of Hotel Corp. Since three specific, separately indictable acts within the meaning of 18 U.S.C. 2314 were charged and found by the jury to have been committed, the pattern required by Section 1962(b) was established. The fact that one of these crimes (the one charged in count 5), independently required that the induced travel by Goberman be pursuant to a "scheme to defraud," and the fact that this scheme may on the facts of the case have been synonymous with Parness's plan to take over Hotel Corp., does not change the clear meaning of Section 1962(b) or affect the validity of the jury's verdict. The two interstate transportations of cashier's checks and the interstate travel by Goberman, alleged in count 1 as constituting the pattern of racketeering activity, were all indictable acts capable of supporting the Section 1962(b) conviction under the clear and unambiguous directive of the statute.

Petitioners contend, however, that the court of appeals did not deal adequately with "the real sources of the vagueness problems" in this case (Pet. 26–27): the

"intertwining" of the requirements of 18 U.S.C. 1962(b) with the requirements of 18 U.S.C. 2314 (Pet. 26) and the "telescoping" into the Section 1962(b) count of the indictment (count one) the requirements of those two separate statutes (Pet. 27). Petitioners maintain that the "lump[ing] together" of the 1962(b) "investment" and the 2314 transactions into a single scheme to defraud deprived Parness of his right to be warned, at a point prior to using the proceeds of indictable acts, that he had in fact committed acts which could be the subject of indictment. Thus, they contend, by requiring a threshold finding of a scheme to defraud, both the indictment and the court's instructions effectively added an element to those contained in Section 1962(b) (Pet. 27–28). Petitioners also contend that it is unclear whether the "pattern of racketeering activity" required by Section 1962(b) "mean[s] (a) at least two independent schemes to defraud forming a pattern of conduct, or (b) at least two elements of a single scheme to defraud" (Pet. 29). They maintain that under the statute the acts of racketeering activity necessary to constitute a "pattern" under 18 U.S.C. 1961(5) must be separated from each other by time or transaction or scheme, and that there must be a similar separation between these predicate activities and the "the main § 1962(b) investment" (Pet. 30).

An examination of the entire statutory scheme makes clear that the statute encompasses both situations posited by petitioners: The situation in which two or more independent schemes to defraud form a patern of conduct is governed by 18 U.S.C. 1962(a),

while the situation in which two or more indictable acts constitute a single scheme (the situation presented by the facts of this case) is governed by 18 U.S.C. 1962(b). As stated in the House Report recommending passage of the Organized Crime Control Act of 1970:

> Subsection (b) prohibits acquisition or maintenance of an interprise (*sic*) through the proscribed pattern of racketeering activity or collection of unlawful debt. * * * [Subsection] (a) focuses on legitimate acquisition with illegitimate funds. Subsection (b) focuses on illegitimate acquisition with illegitimate funds. Subsection (b) focuses on illegitimate acquisition through the proscribed pattern of activity or collection of debt. Consequently, any acquisition meeting the test of subsection (b) is prohibited without exception.

H. Rep. No. 91–1549, 91st Cong., 2d Sess., p. 57. See also S. Rep. No. 91–617, 91st Cong., 1st Sess., p. 159. Subsection (a) thus contemplates the receipt of income from a "pattern of racketeering activity" and the subsequent "invest[ment] * * * of such income, or the proceeds of such income, in acquisition of, any enterprise * * *." Section 1962(b), on the other hand, prohibits one "through a pattern of racketeering activity * * * [from] acquir[ing] or maintain[ing] * * * any interest in or control of any enterprise * * *." By its terms, then, subsection (b) contemplates a number of indictable acts constituting a single scheme while subsection (a) envisions a number of separate acts through which money is obtained and subsequently invested. Petitioner was properly indicted

under subsection (b) since he engaged in a number of acts which together constituted a scheme or pattern through which he gained control of Hotel Corp. 18 U.S.C. 1962 is not vague when its subsections are read together.

Petitioners' argument that Sections 2314 and 1962 (b) were "intertwined" appears to us to amount to a contention that petitioners should have been indicted for the predicate Section 2314 acts prior to their acquisition of Hotel Corp., in order to provide sufficiently clear notice in advance that the acquisition would constitute a violation of Section 1962(b). The argument, that one has a right to be indicted for a criminal act which he has committed before he has an opportunity to use the proceeds of that act in order to engage in other criminal conduct, is frivolous. One is presumed to have knowledge that his conduct is criminal and he does not need a formal indictment to remind him of the fact; moreover, we know of no constitutional right to be charged with a criminal offense. As the court of appeals correctly concluded (Pet. App. 19a–20a):

> As with other federal criminal statutes, violation of which is dependent upon proof of another crime, e.g., the Travel Act, 18 U.S.C. § 1952 (1970), and the Gun Control Act, 18 U.S.C. § 921 et seq. (1970), prosecution under § 1962(b) does not require that the predicate offenses must previously have been charged. [cited cases omitted] * * *.
>
> * * * That [Parness] may have been uncertain as to whether he would be indicted for the predicate offenses is irrelevant to the adequacy

> of the warning of the risk of criminality conveyed by § 1962(b).

Finally even if, as petitioners contend, both the indictment and the court's charge added an element to those contained in Section 1962(b), Parness could only have benefited from this. By requiring a threshold finding of a scheme to defraud, the first count of the indictment and the instructions thereon made Parness's conviction on that count less likely in the event of an acquittal on count 5 (scheme to defraud), notwithstanding convictions on counts 4 and 6. Doubtless, it was for this reason that defense counsel made no objection to this portion of the instructions at trial, endorsed this portion of the instructions at the pre-charge conference (Tr. 1332), and even argued its substance in summation (Tr. 1560). Having made no objection to the charge and having relied on it in closing argument, petitioners cannot be heard to complain now.

2. Petitioners next contend (Pet. 31–34) that the evidence failed to establish the conversion of marker collections on February 4 and 9, 1971 and that the evidence against them was therefore insufficient to support their convictions. They state (Pet. 32):

> The Second Circuit makes no pretense of finding proof that any such marker collections were missing, withheld or unreported, that any such collections were stolen or converted, or that Milton Parness or his wife in fact stole, withheld, converted or took by fraud any marker collections on those dates. Yet proof of something missing or converted was the underlying corpus delicti in this case; tracing the proceeds of such

a conversion to the making of the loan was essential to the § 1962(b) charge.

As the court of appeals noted, however, given the nature of the enterprise involved, the absence of evidence tracing the proceeds of the collections from specific gambler-debtors through Parness and Olympic to Goberman in the form of a loan was not surprising, nor was it fatal to the government's case (Pet. App. 8a–9a). While petitioners appear to concede that Parness was in a position to have collected and withheld substantial amounts of marker receipts (Pet. 31), they would deny the jury the entirely reasonable inference from the evidence that this is in fact what happened. Not only did Hotel Corp. fail to receive some $400,000 in overdue markers at a time when Parness was solely responsible for, and had exclusive control over, marker collections, but in the same period Olympic derived its income almost exclusively from junket front money and marker collections. Moreover, as graphically evidenced by the seizure by the Internal Revenue Service, shortly before the loan to Goberman, of $60,000 in cash marker collections destined for Parness (Pet. App. 8a, n. 7), Parness was actually making substantial collections at this time. From these facts the jury could fairly conclude that the Olympic checks totalling $61,000, as well as the $99,000 in cash, used by Barbara Landew to purchase the cashier's checks represented the proceeds of unremitted marker collections. Indeed, the court of appeals found that it was also reasonable to infer that the seizure of the $60,000 actually precipitated the cover-up of Olympic's participation in the Goberman loan (Pet. App. 10a):

> But for such an unexpected occurrence, Parness would have had sufficient cash with which to have consummated the Goberman transaction undetected. Had such cash been available, Parness need not have resorted to the more easily traceable Olympic checks, and the cover-up would have been unnecessary.

Petitioners dismiss as "some suspicious activities * * * circumstantially consistent with [their] having stolen the money" (Pet. 33) the massive evidence of their efforts to conceal both Olympic's role and any personal involvement of Milton Parness in the Goberman loan. As indicated earlier, however, the two Olympic checks were reflected on Olympic's books as payments for air fares, a misrepresentation perpetuated by Barbara Landew in her testimony before the grand jury that it was Levrey who had provided $150,000 in cash for the Goberman loan. Parness himself used nominees in the loan agreement [8] as well as a straw man in connection with his acquisition of Aliter and Terrasol, to which the Hotel Corp. stock was passed. Finally, Parness had documents prepared which falsely represented that first Aliter and then Levrey had provided the funds used to acquire Hotel Corp. The court of appeals, observing that the government adduced "overwhelming evidence" disproving petitioners' various false representations, found ample evidence to justify the rational inference "that all were part of Parness' scheme to cover up his con-

[8] Indeed, he had sought to conceal his interest in Olympic itself, executing corporate documents in the name of Edward Feldman without the latter's knowledge. Later he tried to persuade Feldman to testify falsely at trial that he had authorized Parness to use his name (Tr. 592, 601, 603, 609–610, 669).

version of money due Hotel Corp." (Pet. App 11a). The court concluded (*ibid.*):

> [I]n the context of this record and in view of the complete absence of any credible explanation as to the source of funds used in connection with the Goberman loan, we fail to see how the jury could have reached any conclusion except that Parness had withheld marker collections and had used the proceeds of such collections and the front money to acquire Goberman's interest in Hotel Corp.[9]

3. Finally, petitioners claim (Pet. 34–35) that there was a fatal variance between the indictment and the proof of the conversions and that the jury's general verdict on all counts may have been based on proof of conversions occurring, not on February 4 and 9 as alleged, but at some unspecified later date when Parness denied Goberman access to marker collections remitted to Hotel Corp. The trial judge, they contend, sanctioned an amendment to the indictment when he instructed the jury that the government's theory under Section 1962(b) was either that Parness withheld marker collections or that, "if he did remit them,

[9] The court's reference to the "absence of any credible explanation" was perfectly proper. In context, the statement in no way impairs petitioners' Fifth Amendment privilege. Rather, it merely means that when, as here, the defense offers no evidence whatsoever, the jury may well infer from the evidence adduced by the government the existence of matters adverse to the defendants, whereas, had the defendants supplied a credible exculpatory version from *any* source—not necessarily their own testimony—those inferences might have been rebutted. See *United States* v. *Frank*, 494 F. 2d 145, 153 (C.A. 2), certiorari denied, October 15, 1974, Nos. 73–1603, 73–1674, 73–1849, 73–1850.

Mr. Goberman was denied their use" (Tr. 1722). This instruction, however, was given as part of the charge under count 1 that the jury must, as a threshold matter, find a "scheme or plan" to defraud Goberman. The court then addressed the "second element," the pattern of racketeering activity, and specifically instructed the jury that here "you have got to find that the government has proved at least two of [the three separately alleged violations of Section 2314]" (Tr. 1723), an instruction twice repeated (Tr. 1724–1725, 1729). Thus, contrary to petitioner's claim, it is clear that the trial judge did not instruct the jury to consider the evidence of later denial of access to remitted funds on the issue of the conversions. He correctly reviewed only the events alleged to have occurred on February 4 and 9 as bearing on those crimes (Tr. 1723–1728).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974